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IN THE
Supreme Court of the United States

October Term, 1970

NOS. 55 and 58

**UNITED STATES OF AMERICA AND
THE POSTMASTER GENERAL,**

Appellants,

v.

THE BOOK BIN,

Appellee.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA**

BRIEF FOR APPELLEE

STATUTORY BACKGROUND

I. Section 4006:

Although *Section 4006* was modeled on *Section 4005* in its enactment the provisions vary greatly. Whereas *Section 4005* deals with the elements of fraud and fraudulent schemes and the obtaining of monies through this type of scheme,

Section 4006 does not in any way purport to involve anything except *First Amendment* materials. Where a Section 4005 violation may involve selling fraudulent goods and wares, i.e., stocks, bonds, merchandise, a Section 4006 violation involves the freedoms of expression, speech and press, i.e., books, magazines, periodicals, newspapers, etc. The former is objectionable upon the grounds of fraud whereas the objection interposed against Section 4006 material does not recite fraud in any form but bases the objection solely upon literary and graphic depictions as not being acceptable to the Postmaster General and his employees, i.e., the General Counsel and the hearing examiners.

An additional infirmity in appellant's brief is that he cites *Donaldson v. Read Magazine*, 333 U.S. 178 as supporting the constitutionality of Section 4006 and its procedures. Actually the *Donaldson* case was upheld only after the Postmaster General modified his mail block order to only include mail addressed to the puzzle contest (Pp. 182-183); and would not impose such a bloc;

"... to the magazines, to their editor, or the three corporate respondents."

and yet under Section 4006 the Postmaster General may stamp unlawful and return to the senders "registered letters or other letters or mail..." and refuse payment of money orders or postal notes for "such a person or his representative..."

This then effectively creates a total mail block. The mail matter itself does not have to be obscene nor do the money orders have to be connected only with an obscene publication. Whether the mail is not impounded by the Postmasters is immaterial for if one cannot receive then the receipt of mail is completely neutralized. All this may be had

without judicial determinations being had. As construed by the United States Supreme Court, *Section 4005* is not comparably as broad. Therefore the validity of *Section 4005* has no bearing whatsoever to *Section 4006* and the matter at bar.

II. Section 4007

This provision imposes no time limit upon the District Court or postal authorities within which an injunctive order must expire for staleness. Theoretically, the injunctive order may be imposed to the point that a commercial disseminator will have to go out of business. The statute recognizes that an injunctive order may be issued until "... the conclusion of the statutory proceedings and *any appeal therefrom.*" (Emphasis supplied).

Appellant recognizes the extent of time for ultimate departmental findings;

"The proceedings can take so long that distribution is essentially complete by the time an administrative order can be entered." (Pp 8 appellant's brief)

In the face of this, appellant recognizes the delay inherent within administrative proceedings by citing the revisions of the Code enacted by Congress to permit the postal authorities to seek a mail block by showing a mere "probable cause" to a District Court effectively escaping any time limitation. This latest revision removes all time limitations from the Postmaster General and permits a hearing;

"(W)henever practicable... within 30 days of the date of the notice" 39 C.F.R. Section 952.7

and upon hearing had the Postal Examiner is only required to issue his findings with:

"all due speed," 39 C.F.R. Section 952.4.

In the face of this there are other provisions for a rehearing without ever resorting to the Courts for a hearing upon the merits. The postal authorities lose nothing since a mail bloc precludes dissemination yet the mail recipient has no alternative but to face this delay without recourse merely upon a showing of "probable cause" and thereafter seek his own judicial review without the injunctive order ever expiring.

SUMMARY OF ARGUMENT

Appellee agrees with the statement of appellant that the exercise of *First Amendment* freedoms limits the actions Congress may take in regulating the postal services. It is this limitation that is before the Court in the premises. Frauds and lotteries cannot in any way be equated with the publications and therefore may not be used to premise the thought that the appellee intends to or may actually use the mails uncontrolled by Congress.

There is no similarity between obtaining money by fraud from unsuspecting citizens and the dissemination to persons wishing to receive the presumptively protected materials carried in the mails. At no time has appellee contended that the *First Amendment* confers complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography. In reality the material herein has not been judicially determined as pornography or as being obscene in the constitutional sense.

The reading of *Stanley v. Georgia*, 394 U.S. 557 again reveals the sensitive nature of the freedoms coveted by the founding fathers espoused by this Court. That decision turned upon the right of a United States citizen to possess and view materials whether obscene in the eyes of the law or not where this possession and viewing did not encroach upon the rights of others.

It then becomes a question of whether this right of possession requires a criminal act or an act to be precluded by the postal authorities in order to be fully exercised. In summary, must one create a criminal act of sale and purchase or as in this case seek and receive purportedly non-mailable matter and have his postal money order payment, obtained lawfully then dishonored and refused to be honored as payment for that which may constitutionally be possessed and enjoyed by him. By what principle may a public service agency become censors of the public's reading and entertainment materials? This Court recognized in *Stanley*, supra, that these freedoms are fundamental to our way of life.

ARGUMENT

I.

- A. Congress may not grant and the Postmaster General may not invoke mail blocks for the sole purpose of censorship.

The Constitution of the United States grants to Congress the duty to establish post offices and post roads. And under the commerce power may legislate against interstate acts. Together the Congress may set up what constitutes a crime and punishment for its commission. That is the recognized means to regulate intolerable acts. Congress should not delegate to administrative agencies criminal determinations where constitutional liberties are at stake.

While obscenity is subject to regulation and proscription, the statute of necessity must conform to those procedures that do not inhibit the free exercise of speech and press that are protected. These enactments do not protect these freedoms but engulf them in an all encompassing statute, the good and the bad.

Congress has seen fit to regulate obscenity in the mails, 18 U.S.C. 1461, and has provided criminal penalties for engaging in such conduct. Appellant contends that the statutes herein reflect an intention of Congress to curb the commercial exploitation through the mails of pornographic matter. Congress, however, has already provided a criminal penalty for such violations. A criminal statute, however, requires the burden of proof to be beyond a reasonable doubt, and it of necessity must follow an adversary hearing with the burden of persuasion upon the enforcement officials. The converse is true under these statutes. Postal authorities need only institute the necessary administrative proceedings within the Post Office Department to be in the position of seeking and obtaining a mail block. In enforcing the mail block aided by an injunction order, they need only show "probable cause." There is no judicial finding of obscenity of the particular material. Additionally, a completely effective mail block is imposed with no resultant distribution. The recipient then must of necessity take certain actions in order to receive any mail and then only when it is shown that the mail matter is clearly unconnected with the allegedly obscene material.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative decision or in combination with a sweeping order under Section 4007, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost

importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"... the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

Postal blocks are clearly repugnant to the *Constitution of the United States*. This Court has settled the law that postal blocks are unconstitutional by placing a duty upon the restricted recipient to act in order to enjoy the free use of mail distribution. The power of censorship has never been given to the Postmaster General. This Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, stated the following of the censorship power undertaken there by the Postmaster General:

"An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred. (Emphasis supplied)

"We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the Court held in *ex parte Jackson*, 96 U.S. 727, 24 L. ed. 877, that Congress could constitutionally make it a crime to

send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

And in *Martin v. Struthers*, 319 U.S. 141, this Court dealt with a municipal ordinance forbidding the door to door dissemination of pamphlets and periodicals. It was stated:

"The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

How different is it that the judgment of the recipient and disseminator of *First Amendment* materials is substituted in the case at bar for the judgment of the Postmaster General and other postal authorities.

And again as stated as early as 1921 in the case styled *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, in Justice Holmes' dissenting opinion, at page 437:

"The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."

This Court had before it another case involving obscene mail matter in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. The Court struck down the lower court ruling but could not agree upon a single opinion. However, Mr. Justice Brennan and two other members of the Court in a separate opinion stated:

"We have sustained the criminal sanctions of Sec. 1461 against a challenge of unconstitutionality under the *First Amendment*. *Roth v. United States*, 354

U.S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. We have emphasized, however, that the necessity for safeguarding *First Amendment* protections for nonobscene materials means that Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731, 6 L. ed. 2d 1127, 1136, 81 S. Ct. 1708. I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts."

Mr. Justice Brennan then cited with approval a quote from one of the Court's prior decisions entitled *Hannegan v. Esquire, supra*:

"The provisions...would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. *Hannegan v. Esquire, Inc.*, 327 U.S. at 156, 90 L. ed. 586, 66 S. Ct. 456. I, therefore, concur in the judgment of reversal."

The Court in *Lamont v. Postmaster General*, 381 U.S. 301, quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But when habit and law combine to exclude every other (means of transportation of mail) it seems to me that the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in

the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . ."

B. The Constitutional right to private possession of obscene materials envisions the Constitutional right to obtain and receive them and conversely the right to disseminate them to consenting adults under controlled circumstances.

Consonant with an individual's right to private possession of obscene materials, *Stanley v. Georgia*, 22 L. Ed. 2d 542, there must be a correlative right for that individual citizen to acquire such material and transport it to the privacy of his home. For the right to possess necessarily requires and presupposes an individual's right to acquire and upon acquisition the right to transport it or have it delivered to the privacy of his home.

The United States Supreme Court in *Stanley v. Georgia*, 22 L. Ed. 2d 542 stated the following of an individual's right to private possession and receipt of materials irrespective whether they were obscene or not:

"It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press), . . . necessarily protects the right to receive . . . ' *Martin v. City of Struthers*, 319 US 141, 143, 87 L. Ed. 1313, 1316, 63 S. Ct. 862 (1943); see *Griswold v. Connecticut*, 381 US 479, 482, 14 L. Ed. 2d 510, 513, 85 S. Ct. 1678 (1965); *Lamont v. Postmaster General*, 381 US 301, 307-308, 14 L. Ed. 2d 398, 402, 403, 85 S. Ct. 1493 (1965) (Brennan, J., concurring); cf. *Pierce v. Society of Sisters*, 268 US 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468 (1925). *This right to receive information and ideas regardless of their social worth*, see *Winters v. New York*, 333 US 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665 (1948), is fundamental

to our free society. Moreover in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man."

The full impact of *Stanley* will not be known for a considerable length of time. Some courts have already been called upon to expound upon the right to receive and possess privately, materials deemed obscene under various standards previously set forth by appellate courts.

The basic premise consonant with the right to receive and possess is the ability to acquire. The United States District Court for the District of Massachusetts, constituting a statutory Three Judge Court, convened to determine the extent of *Stanley* in relation to consenting adults' right to view an obscene film within an adults only motion picture theater. The plaintiff there asserted the right to exhibit the film, obscene or not, under controlled circumstances not involving *Ginzberg* pandering and not disseminated to minors nor foisted upon the public in such a manner that it would affront an individual wishing to avoid confrontation with it. The plaintiff further showed the court that the exterior of the

moving picture theater had sufficient notice of the type materials displayed leaving to the individual the choice of entering or not. That court in *Karalex v. Byrne*, 306 F. Supp. 1363 (1969), (pending decision on appeal in this Court), found that the right to receive and possess was co-extensive with the right to obtain and that, what a rich Stanley may do at home a poor Stanley may view outside his home and reported out as follows:

"The question, how far does Stanley go. Is the decision to be limited to the precise problem of 'mere private possession of obscene material,' 394 U.S. at 561, 89 S. Ct. at 1245; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth v. United States*, 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, was 'not impaired by today's holding,' and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that 'obscenity is not within the area of constitutionally protected speech or press,' 354 U.S. at 485, 77 S. Ct. at 1309, whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was 'devoid of any ideological content' was irrelevant. 394 U.S. at 566, 89 S. Ct. at 1248.

"Of greater importance, a need for affirmative proof that obscenity raises a 'clear and present danger of anti-social conduct or will probably induce its recipients to such conduct,' rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of 'public distribution.' The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful. 394 U.S. at 567, 89 S. Ct. 1243. Had the court

considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

"In recognizing that public distribution differed from private consumption, the Court in Stanley gave two examples. In thy case of public distribution, 'obscene material might fall into the hands of children *** or *** it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567, 89 S. Ct. at 1249. To these examples, which were the extent of the Court's discussion, it can be said equally with Stanley, 'No such dangers are present in this case.'

"We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of the criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. Cf. *Griswold v. Connecticut*, 1965, 381 U.S. 479, 86 S. Ct. 1678, 14 L. Ed. 2d 510. *If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.*" (Emphasis supplied)

The United States District Court, Central District of California in the matter styled *U.S. v. Thirty-Seven Photographs, et al*, 309 F. Supp. 36, (also awaiting decision by this Court), wherein a Three Judge Court dealt with a statute restricting the right of a citizen acquiring obscene material for possession by importing these materials into the United States. The plaintiff there arrived in Los Angeles from

Europe via airplane. Custom officials found photographs in his luggage and confiscated them under the statute. The plaintiff in court candidly admitted he was to incorporate these snapshots into a book for distribution.

The Court unanimously held *inter alia* that the statute would effectively deny a citizen's right to private viewing and possession of obscene materials and ruled the federal statute unconstitutional and ordered return of the photographs and stated:

"The cornerstone of the attack, of course, is *Stanley v. Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis v. Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

"The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls into the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

"19 USC. Section 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

"The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland*, 380 U.S. 51 (1965) grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), '(T)he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.'

"The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent."

Thereafter the same United States District Court with a single judge sitting was presented with an identical proposition and the United States presented a Motion to Dismiss to the court under the ruling of the Three Judge Court previously cited. This matter styled *U.S. v. Four Books Entitled "Sexual Freedom,"* Civil No. 69-2328-F 2/10/70 was ordered dismissed. Dismissal was prefaced upon the adjudication that the Three Judge Court had previously made.

The United States District Court for the Northern District of Texas, Dallas Division, in *Stein v. Batchelor*, 300 F. Supp. 602, at page 606-607 dwelled upon the extent of the Stanley holding. There the court found that the Stanley doctrine implied that obscenity is fully protected and the state had an interest only in regulating the manner of public dissemination.

Text writers have expounded upon the theory also. Professor Frank I. Michelman, Harvard Law School, wrote in "*The Supreme Court, 1968 Term,s,*" *83 Harvard Law Review* 7, 147-154 (1969) of protecting the poor through the Fourteenth Amendment.

"Retreating somewhat in *Stanley*, the Court held that the First Amendment does indeed forbid a state to impose a criminal penalty merely for the knowing, private possession of obscene material. Its opinion espoused a new approach to first amendment obscenity doctrine that has wide-ranging implications.

"Writing for five members of the Court, Mr. Justice Marshall stated that private possession of obscene material is protected by the First Amendment, supplemented by a right of privacy. A purpose fundamental to the protection of free speech, he said, is the guaranty of 'the right to receive information and ideas, regardless of their social worth.'

"The 'right to receive' he went on, 'takes on an added dimension' when joined as here with the 'right to be free . . . from unwanted governmental intrusions into one's privacy.'

"In *Stanley*, however, the Court found 'little empirical evidence' indicative that obscenity and harmful conduct are usually connected. More importantly, it said that 'in the context of private consumption' the state may achieve its purpose through less restrictive alternatives. It may, for example, employ education or punishment of the deviant conduct itself. The same criticism applies to laws regulating public distribution. It is unlikely that the evidence is any greater that contact with obscenity through public distribution leads to harmful conduct. Indeed, one who peruses pornography alone in his home probably had to obtain it through public distribution in the first place. The less restrictive

alternative principle also would apply, though perhaps somewhat less forcefully, to a ban on public distribution.

...

"Interpretation of Stanley simply as a privacy decision, however, is belied by the Court's description of the privacy factor as an 'added' consideration and its formulation of the opinion in clear First Amendment terms. The principal underpinning of the opinion is really the 'right to receive' obscene material. It is that doctrinal innovation that gives the Stanley decision elasticity. The Court's concern for a 'right to receive' ideas came to light in *Martin v. City of Struthers*, relied upon by the Stanley Court. There, it served to invalidate an ordinance forbidding door-to-door distribution of handbills. Martin thus acknowledges the obvious: *that receipt is simply the last step in the process of distribution. Protection of the former requires at least some protection of the latter.* Similarly in the obscenity context, the 'right to receive information and ideas, regardless of their social worth,' should serve after Stanley to protect certain forms of public distribution as well as private possession. Surely that right may be effectively denied through a ban on all distribution of obscene material.

"So conceived, the 'right to receive' obscene material gives new meaning to the Court's distinction between private consumption and public distribution. An attribute of privacy — just as of the 'right to receive' — is the ability to control one's personal environment. *Unwanted intrusions violate one's privacy. Yet only some forms of distribution of obscene material invade that interest.* A movie theater showing a pornographic film, for example, is public in the sense that anyone may enter if he pays the price. But the movie it shows is not 'publicly' distributed in the sense of forcing unwanted obscenity on anyone.

The theater does not invade the privacy interest in freedom from unwelcome intrusion, so long as its advertising on the street is not itself obscene. In this matter, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals. So defined, it may be banned.

"Already, one federal court has taken a step in this direction. To preserve the constitutionality of a disorderly conduct statute punishing the use of profane language in any public place, the D.C. Circuit in *Williams v. District of Columbia* read into it the qualification that the Government must allege and prove that members of the public actually heard the obscene words. The *Williams* court spoke of 'verbal assault' as the necessary ingredient after Stanley. This opinion suggests that Stanley protects a person reading an obscene publication in a public place as well as his home.

"Stanley may, then, signal a new doctrine that would permit obscenity to be banned only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake. The essence of an obscenity offense thus would be offense. *In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will.* The presumed offensiveness of obscenity would allow the government to prohibit unwanted intrusions whereas the government is more constrained in its efforts to prohibit intrusions by, for example, political propagandists. Conceived in this way, the shape of the new obscenity law would approximate the nuisance standard embodied in the Model Penal Code provisions on lewd conduct. Obscene publication that may be banned, like conduct that is lewd would be described as that 'which he (the offender) knows is likely to be

observed (unwillingly) by others who would be affronted or alarmed.'

"The new doctrine suggested by the Stanley opinion is the product of more than a decade in which the Court has struggled with its own libertarian impulses as it battled head on with an instinctive notion that some obscenity regulation is both permissible and desirable. The emerging doctrine after Stanley may be uncertain in its own way. Mr. Justice Sutherland summarized well the necessarily contextual character of laws prohibiting offensive action. 'A nuisance,' he said, 'may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.' In the case of obscenity laws, the factor distinguishing parlors from barnyards should be the consent of all those brought into contact with the obscene material. Despite the continuing need for ad hoc resolution of conflicting forces, there is after Stanley at least hope that the lines of battle will be more aptly drawn." (Emphasis supplied).

This approach leaves to the individual citizen his basic right to choose his own way in life so long as it does not encroach upon the rights of others.

To arrive at this conclusion one must review the progress of decisions both on the federal level and on the state court level. The earlier decisions revealed a clear lack of direction leading up to *Redrup*. From *Redrup* the path was clearer but still too elusive for many courts to follow resulting in multiple reversals. The final refinement appears in *Stanley* and the decisions following it have apparently begun to delineate it even further.

The fountainhead for the definition of obscenity decided over a decade ago was *Roth v. United States*, 354 U.S. 476. The primary question there was whether obscenity was protected expression under the *First Amendment*. That Court

ruled then that it was not. The opinion held the protection was available to all ideas having even "the slightest redeeming social importance." The Court further held that sex and obscenity were not synonymous and that ceaseless vigilance was the watchword to prevent the erosion of freedoms under the Constitution. The Court rejected the older Hicklin test and substituted "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 48-489.

The result was that the lower courts as well as the Supreme Court and the state courts fought with the application of the Roth-Alberts tests. Problems rose as to "community standards", "prurient interest" and "social importance." See *United Artists Corp. v City of Dallas*, 390 U.S. 629; *Ginsburg v. U.S.*, 383 U.S. 463; *Memoirs v. Massachusetts*, 383 U.S. 413; *Jacobellis v. Ohio*, 378 U.S. 184; and *Redrup v. New York*, 386 U.S. 767 and in particular see the concurring and dissenting opinions.

Similarly, problems arose in the application of these tests to the particular materials before the various courts for adjudication. Each obscenity matter before the courts necessarily brought with it *First Amendment* problems. There was no definite and identifiable course to follow that evolved out of these multiple cases. Rather the path became even more confusing in the light of the multiple reversals based upon *Redrup*, supra. The Supreme Court then looked to *Jacobellis v. Ohio*, 378 U.S. 184 to bring about order out of chaos by requiring a determination first that the material exceeded the customary limits of candor in the description or representation of sex or nudity. Mr. Justice Brennan urged that the standard to be applied was national in scope. The final clarity set forth was that the matter must be utterly without social importance, 378 U.S. 191.

After only two years the Court was again faced with the same problems. In *Memoirs v. Massachusetts*, 383 U.S. 413, this Court held that after each of the three individual tests were applied it must also be shown that the elements have coalesced although applied independently.

That Court found that even this did not provide the ground rules sufficient to delineate what may or what may not be proscribed. Another case arose, *Redrup v. New York*, 386 U.S. 767, (actually three cases were involved, *Austin v. Kentucky*, and *Gent v. Arkansas*) which was disposed of by reversing the lower court in a per curiam opinion. The Court noted the diverse views of the individual justices in trying to determine what material was subject to proscription and in any event held the materials before the Court was protected expression and could not be proscribed by proceedings criminal or civil, *in personam* or *in rem*. It was further noted that in none of the cases was there:

"A claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 11 L. Ed. 645; cf. *Butler v. State of Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria*, 341 U.S. 622, 7, S. Ct. 920, 95 L. Ed. 1233; *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 72 S. Ct. 814, 96 L. Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31." (*Redrup v. New York*, 386 U.S. at 769).

Clearly the implication was that the Court was no longer looking at the materials in and of themselves but rather respected the right to receive and possess together with the right to disseminate under controlled circumstances. No longer was matter obscene by any test precluded from the citizens who desired to have it. The Court in referring to the older *Roth* case stated:

"It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U.S. at 486-487, 77 S. Ct., at 1309-1310. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York*, 386 U.S. 767, 799, 87 S. Ct. 1414, 1415, 18 L. Ed. 2d 515 (1967). No such dangers are present in this case." (89 S. Ct. at 1249, emphasis added).

The reference by Justice Marshall in *Stanley* to the article by Professor Emerson is of more than passing interest. In that article, various interests allegedly sought to be protected by restriction on obscene publications, are examined by the author in the light of the decision in *Roth-Alberts*. Professor Emerson's conclusion is that most of the justifications advanced for the obscenity laws are incompatible with the basic theory of freedom of expression as incorporated in the *First Amendment* and the rule of the *Roth* case is open to criticism upon these grounds. The author concludes that the only interests which could arguably justify state intervention in this area are, first, "where a shock effect is produced by forcing an "obscene" communication upon a person contrary to his wishes" or, second, "where the interest at stake is the

effect of erotic expression upon children." 72 *Yale L.J.* at 938-939.

The Supreme Court reversed multiple cases arising later from the lower courts in per curiam opinions based upon the *Redrup* holding. It would appear that there was evolving a clearer path for the Courts to follow in obscenity litigation. Consenting adults were entitled to receive materials for their private possession and perusal irrespective of whether other members of the community were so inclined. The pattern of dissemination then became the focusing feature. The thesis was advanced by lower courts that adults were entitled to receive and conversely the material had to be disseminated to them in order for the consenting adults to so receive and possess. It was in the manner of dissemination that regulation should be enforced. In the absence of dissemination to juveniles and in the absence of intrusion upon the sensibilities of an individual wishing to avoid confrontation with it, the materials should prevail and be available to those adults wishing to receive them. See for example *Grant & Wissman v. United States*, 380 F. 2d 748 (9 Cir. 1967).

On April 7, 1969, the Supreme Court in a decision of paramount importance came to grips with the problem once again and upheld the right to private possession of *First Amendment* materials irrespective of whether they were "hard-core" pornography in the matter styled *Stanley v. Georgia*, 89 S. Ct. 1243, 22 L. ed. 2d 542. Mr. Justice Marshall stated:

"We do not believe that this case can be decided simply by citing Roth.

...

"It is now well established that the Constitution respects the right to receive information and

ideas... This right to receive information and ideas regardless of their social worth... is fundamental to our free society."

There were no dissenting opinions in the *Stanley* decision.

As was stated by Mr Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479:

"... (T)he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read... without those peripheral rights the specific rights would be less secure.*" (Emphasis supplied).

One who has the constitutional right to possess "obscene" material and the right to receive it, of necessity must have the right to purchase the materials. It cannot be argued that the right to read a book or newspaper is secure and by statute preclude the sale or dissemination of the same publications. These same citizens cannot be required to obtain the materials illegally in order to lawfully possess them.

The conclusion in logic then is that, absent dissemination to juveniles contravening a statute reflecting a limited and specific government concern for juveniles and the foisting upon the sensibilities of an unwilling individual in a manner that the individual cannot avoid confrontation with it, the materials herein are protected expression and cannot be suppressed from dissemination to consenting and willing adults. The dissemination of the materials involved in the case at bar was conducted in a controlled adults only environment and in no way violated the principles set forth herein so as to justify the institution of mail block proceedings against Appellees and recipient citizens.

In further elaboration of this type of approach to proceedings for alleged enforcement of obscenity statutes, as noted previously, the United States District Court for the District of Massachusetts, in an opinion filed on November 28, 1969, by a Three Judge Court, in a case styled *Karalexis v. Byrnes*, 306 F. Supp. 1363, stated:

"We are asked to rule that this decision (*Stanley v. State of Georgia*, 1969, 394 U.S. 557) extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

* * * * *

"The Following facts appear by stipulation of counsel or otherwise. Plaintiffs (Motion picture operator) have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg v. United States*, 1966, 383 U.S. 363. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

"For the purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts Courts.

* * * * *

"The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of mere private possession of obscene material, (394 U.S. at 561); is it the high water mark of a past flood, or is it the precursor of a new one?"

* * * * *

"In recognizing the public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, 'obscene material might fall into the hands of children . . . or . . . it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, 'No such dangers are present in this case.'"

* * * * *

"We think it probable that Roth remains fully intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

The Court thereafter went on to say:

"If a rich *Stanley* can view a film, or read a book, in his home, a poorer *Stanley* should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Subsequently the United States District Court, Central District of California in the matter styled *U.S. v. Thirty-Seven Photographs*, *supra*, cited *Stanley* as authority and held the federal statute restricting importation of obscene pictures invalid as limiting private possession by precluding transportation, acquisition and importation of them. The Court there stated:

"The cornerstone of the attack, of course, is *Stanley v. Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalex v. Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.C. Texas 1969).

"The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

"19 U.S.C. Section 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

"The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), '(T)he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

"The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

"A second attack on the statute further involves *Freedman v. Maryland, supra*. Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

"In the contest of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

"We are aware of *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 89, 399 (2d Cir, 1966) which stated, '(S)pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme...' That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman, supra* at 58-59, '(T)he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period.. go to court...' We must follow *Freedman*."

Thereafter the United States District Court for the Central District of California in the matter styled *U.S. v. Four (4) Books Entitled "Sexual Freedom,"* Civil No. 69-2328-F, 2/10/70 had before it another seizure case involving *First Amendment* materials at customs. The prosecution motioned

the Court to dismiss the complaint based upon the ruling of the Three-Judge Court in *U.S. v. Thirty-Seven Photographs*. The Court granted the motion and ordered the return of the materials to the claimant.

On April 29, 1970 the United States District Court for the Eastern District of California in *U.S. v. Robert Irvine Lethe, U.S.D.C., Ed. Cal. Case No. CR-S-884* heard a case wherein the defendant was arrested and tried for mailing "nonmailable" obscene materials. One of the defenses presented was an attack upon the indictment asserting the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requested them based upon *Stanley v. Georgia*. The Court sustained his contention and found that he was entirely correct as to those counts where the attack was applicable. The Court stated:

"I turn now to defendant's substantive attack on the indictment. He asserts that the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requests them. His argument is based primarily upon *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that 'the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.' 394 U.S. at 568. The right to possess, he argues, implies the right to buy or receive, and the right to buy or receive is meaningless unless someone has the right to sell or send.

"Before *Stanley*, the quick answer to defendant's argument would have been that *Roth v. United States*, 354 U.S. 476 (1957), held that obscenity was outside the protection of the First Amendment and the government could regulate its possession and distribution at will, like any other contraband. However, *Stanley* clearly indicates that Roth does not go that far:

'Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protection. Neither Roth or any other decision of this Court reaches that far. (394 U.S. at 563.)'

"The Court then proceeded to examine the constitutional implications and the governmental interests involved in the Georgia statute forbidding more private possession of obscene material.

"It is true that in *Stanley* the Court recognized the important governmental interest in regulating commercial distribution of obscene matter:

'The door barring federal and state intrusion into (the area of First Amendment rights) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' (citing Roth) Roth and the cases following it discerned such an 'important interest' in the regulation of commercial distribution of obscene material. (394 U.S. at 563-564).'

"But to say that the government has an 'important interest' in the regulation of commercial distribution is not to immunize all statutes touching commercial distribution from further judicial scrutiny. In *Stanley* itself the State sought to justify the statute on the ground that it was a necessary incident to its statutory scheme prohibiting distribution. This did not prevent the Court from weighing the governmental interests against the protections of the Constitution.

"Thus, while recognizing the government's legitimate interest in regulating distribution, I proceed to examine the constitutional implications of prohibiting

use of the mails for distribution of obscene materials to one who has requested them. I start with the proposition that the government may not legislate to control what books or films a person may possess in his house regardless of their content.

'If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).'

"If the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The only possible purpose in preventing him from acquiring them is to prevent him from enjoying them.

'It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive . . . (Citations) This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).'

"The governmental interest is not augmented because a person *buys* the material instead of receiving it some other way. Thus, I conclude that a person has a constitutional right to buy or receive obscene material.

"The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a

crime to sell the book to him? I think not, unless the government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying.

"There are basically only four goals which have been used to justify restrictions on dissemination of obscene material: (1) preventing crime of sexual violence, (2) protecting the society's moral fabric, (3) protecting children from exposure to obscenity, and (4) preventing 'assaults' on the sensibilities of an unwilling public. It is clear from *Stanley* that the Supreme Court does not consider either of the first two legitimate justifications for obscenity legislation:

'(I)n the face of . . . traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment . . . ' (The Constitution's) guarantee is not confined to the expression of ideas that are conventional or shared by a majority . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' *Cg. Joseph Burstyn Inc. v. Wilson*, 345 U.S. 495 . . . (1952). Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for a court to draw, if indeed such a line can be drawn at all . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally promise legislation on the desirability of controlling a person's private thoughts.

'Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents are education and punishment for violations of the law . . . ' Whitney v. California, 274 U.S. 357, 378 . . . (1927) (Brandaiss, J. concurring) . . . Given the present state of knowledge, the State may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.' (footnotes omitted) (394 U.S. at 565-67).

"See also *Redrup v. New York*, 386 U.S. 767 (1967). The Supreme Court has recognized the protection of children and the protection of an unwilling public from obtrusive invasions of privacy as proper governmental interests justifying obscenity laws. But neither of these can be used to justify prohibiting mailings to a requesting adult. There is no public display, and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution."

The United States District Court for the Northern District of California in the matter styled *Alan Kalker v. Lim P. Lee*, No. 51488, decided September 22, 1969, by analogy, had before it a matter involving enforcement of a postal regulation 39 C.F.R. Section 262 wherein postal authorities were permitted to detain any letter suspected of containing prohibited matter and seek authorization to open it and examine the contents if the letter was mailed from a foreign

country. If such permission was not given the postal authorities could stamp the letter "unclaimed" and return it to the sender. The contention of the Petitioner in that matter was to the effect that he would concede the right of the postal authorities to open the mail and examine the contents in line with the customs power of the federal government. He disagreed, however, with the provision permitting the postal authorities to not permit receipt of the materials but to stamp the letter unclaimed in the event permission from him was not forthcoming and thereafter to return the letter to its origin. The court held that upon this ground the postal regulation was invalid.

The principle set forth here is not a novel one. It has been applied in other fields of regulation. For example where one uses obscene language on a public sidewalk without encroaching upon the rights of others or inciting a breach of the peace he may not be criminally punished. In that case entitled *Williams v. District of Columbia*, 419 F. 2d. 638, (1969) the United States Court of Appeals, District of Columbia Circuit at page 645 the Court found that the Government had no legitimate interest in punishing anyone for uttering obscene or profane language out of the presence of anyone else. The guiding principle was that the speech could not incite a breach of the peace or inflict injury upon another by verbal assault. Yet private indulgence of obscene expression was protected.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down the Connecticut statute restricting the dissemination of contraceptive information and materials to willing adults. The Court held that the freedom of speech and press includes the right to distribute, receive and read. In essence where a willing adult sought information the state there could not place an impediment to the receipt

and use of the materials consistent with fundamental *First Amendment* freedoms. There is nothing more analogous than the thesis in the case at bar.

In *Sidney Babbitz v. McCann*, U.S.D.C. Ed. Wis. (1970) Civil No. 69-C-548, the Court found a fundamental right to receive an abortion which was prohibited by Wisconsin law. This right was fundamental and extended until such time as the embryo "quickened" in the event the act would affect the interests of another, i.e., the quickened embryo. This analogy may be factually far afield of the situation where freedom of speech and press are concerned but it does serve a purpose in that it equates with the general thesis that a citizen may constitutionally be protected in the willing receipt of those materials that do not encroach upon the rights of others.

Professor Richard A. Kane wrote an article entitled "*Stanley v. Georgia: New Directions In Obscenity Regulations?*", Vol. 48, Texas Law Rev., 646. In his article he suggests that the original *Roth* decision is a misapplication of some fundamental principles under the *First Amendment* and should be reversed. His research of case law and research authorities failed to substantiate the point that obscenity leads to crime or antisocial conduct. In his article he stated:

"While this view of *Stanley* would be the least disruptive, and undoubtedly the most popular, it requires a very selective reading of the opinion. In the first place, the Stein view would seem to be inconsistent with *Stanley's* guarantee of the right merely to possess obscene material. If an adult has a constitutional right to possess and read obscene material, he should have the right to procure that material. If one person has the right to procure, some other person must have the right to disseminate. The prohibition of sales would most certainly take the right to possess away completely.

"More importantly, allowing conviction for sales in all circumstances would be inconsistent with the danger approach to obscenity regulation taken by the Court in *Stanley*. If the Court is going to require that dangers be shown to allow regulation, it should not permit regulation when no dangers are shown. Although the Court states that dangers might be present in cases of commercial distribution, it is equally possible that they might not be present. Therefore, any statute prohibiting the sales of obscene materials should be limited to cases in which dangers have been shown to be present.

...

V. Conclusion

"Although the *Stanley* opinion contains all the elements necessary for a repudiation of the two-level theory and the enunciation of a straightforward danger test for speech relating to sex, the Court failed expressly to reject the doctrine. Its statement that *Roth* is still good law will keep the doctrine alive until the Court officially announces its demise.

"The time has come for the Court to reject the theory explicitly. It has not worked in practice and has become so honeycombed with exceptions and conflicting opinions that its basic rationale, the blanket exclusion of certain classes of speech from the first amendment, has all but disappeared."

In the case note of the *California Law Review* entitled "*Constitutional Law—First Amendment: The New Metaphysics of the Law of Obscenity. Stanley v. Georgia*, (U.S. 1969)." Vol. 57: Cal. L. Rev. 1257 is contained a comprehensive review of *Stanley*. The article contains four parts, 1) *PreStanley* doctrine; 2) the impact of *Stanley* upon the old doctrines; 3) analysis of arguments to justify censorship; and 4) obscenity distribution. After careful review

of the evolution of obscenity doctrines by the courts and the argument in support of censorship the author speaks on the problem of obscenity distribution following *Stanley*. Beginning at page 1277 he states:

"Thus, while protection of children and avoidance of obtrusive public displays of obscenity have received clear endorsement, the Court has ruled that the State's interest in preventing sex crimes and ensuring the citizenry's good moral character are not valid interests on which to base obscenity regulations. In view of the fact that overbreadth is fatal to legislation in the first amendment area, the laws regulating obscene speech must be drawn as narrowly as possible in furtherance of the acceptable goals. It follows, therefore, that only statutes carefully (sic) drafted to protect children and to prevent affronts to the public can withstand the constitutional test. General public distribution (commercial sales) ordinarily involves neither the display of obscenity in such a manner that the public cannot avoid seeing it and being offended by it, nor sales to minors. Each of these evils may be regulated by far narrower prohibitions than a general prohibition on sales.

"Another aspect of the *Stanley* opinion also suggests that blanket restrictions on distribution are unconstitutional. The Court focused on the rights of the would-be purchaser of erotic material, stressing the right of the individual to have access to all material, to 'read or observe what he pleased,' and to 'satisfy his intellectual and emotional needs.' The Court said that these rights were 'fundamental to our scheme of individual liberty,' and it concluded that 'If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.'

"It would seem naive to assume that right of the individual considered so basic can constitutionally be

circumvented by restrictions on the distributor. Commercial activity per se is no ground for regulation, and the obvious purpose of laws prohibiting sales is to prevent the potential recipients from obtaining the material. But it is exactly such access which *Stanley* holds to be so central a freedom. By prohibiting sale of obscene material, the State is 'telling a man . . . what books he may read or what films he may watch.' The freedom to choose what moral standards to adopt and what sort of printed or filmed material to read or observe is the essence of what *Stanley* guarantees to an individual—so long as offensive public display and exposure of minors are avoided. But laws prohibiting non-obtrusive sale of such material to adults will vitiate the rights protected by this commitment.

"The *Stanley* Court's emphasis on the right to privacy is another factor which makes likely a holding that general restrictions on sales are unconstitutional. The rights in jeopardy here are similar to those the Court considered in *Griswold v. Connecticut*, where the Supreme Court reversed the conviction of birth control clinic officials under a State anti-contraception statute. In *Griswold* the Court reasoned that the zone of marital privacy protected by the Constitution guaranteed to the couples receiving information and devices from the clinic the right to be free to choose whether or not to employ contraception without coercive foreclosure of that choice by the State. Since the Court states in *Stanley* that an individual's privacy includes his right to choose what he will read or observe, the parallel to *Griswold* is clear. Prohibition of sales of erotic material violates the individual's right to privacy by denying him the opportunity to make these choices. When this reasoning is combined with the first amendment right of access to all expression and the value of freedom of thought, it seems clear that general prohibitions on sales violate the Constitution."

And of course we must always keep in the forefront of our minds the actual wording of the *First Amendment to the Constitution of the United States*:

"Congress shall make no law . . . abridging freedom of speech, or of the press." (Emphasis supplied).

Under the rationale suggested by the cases quoted herein, the challenged material before this Court in the premises cannot or should not be declared obscene and without the protection of the *First Amendment* unless it can be shown that the defendant in his dissemination abused and intruded on the rights of others.

In one of the most recent pronouncements of this approach, a three judge court unanimously held, in the case styled *U.S. v. Various Articles of Obscene Merchandise*, (Schedule No. 495), U.S. D.C., S.D. N.Y., Case No. 68-Civ.-2971 (decided 6/8/70), that a citizen may constitutionally obtain and receive "obscene" material through importation. The Court held that the customs statute was unconstitutional in its application wherever a citizen desired to receive these materials whether obscene or not.

Another recent decision validating this principle is found in United States District Court for the Central District of California entitled *U.S. v. Reidel*, Criminal No. 8458-HP, Pregerson, J., decided June 8, 1970 (appeal to U.S. Supreme Court filed July 8, 1970). The government agreed that there was no evidence of unsolicited receipt of the obscene materials and no receipt to juveniles but only to consenting adults. The Court stated:

"It would seem to me, anyway, that if a person has the right to receive and possess this material, then someone must have the right to deliver it to him.

This is basically the thought that was expressed in *Karalex v. Byrne*, 306 F. Supp. 1363, a 1969 Massachusetts case, District Court in Massachusetts.

"So it would be my conclusion that where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults, there is no valid governmental interest that I can see that would justify a criminal presentation for distributing this material, and I would therefore, of course, go along with Judge MacBride in the case of *United States v. Lethe*, decided by him on April 29, 1970, Eastern District of California. So this court is, therefore, going to rule that this particular prosecution that is now before it under 18 U.S.C., Section 1461, runs afoul of the First and Fourteenth Amendments. On that basis the motion to dismiss is granted.

"Because the court has ruled that the defendant may not be prosecuted for mailing this obscene material to requesting adult addressees, the court need not pass on the other constitutional questions and need not pass on this matter of requirement of an adversary hearing."

Consequently, under the leading legal theory nationally prevalent, the material before the Court is not obscene in the constitutional sense as a matter of law. Therefore erection of a mail block preventing the mailing and receipt of mail matter between consenting adults is invalid.

II.

Section 4006 constitutes an invalid prior restraint and creates a chilling effect upon First Amendment Freedoms.

- A. The procedural requirements of *Freedman v. Maryland*, 380 U.S. 51 are not met in Section 4006.

Appellant views *Freedman* in the context that a movie censorship scheme differs completely from a mail block. In comparison we find that movie censoring and mail censoring are strikingly similar even though they are separate and distinct in manner of dissemination.

The *Freedman* movie censorship scheme required the prior submission of films to a state agency for licensing prior to dissemination. A license refusal forestalled any showing of the rejected film. But in censorship of the mails the parties using mail carriage delivers the material to the federal government who in turn must carry and deliver the items and honor payment of instruments drawn between the parties. When, during the time of carriage, the postal authorities deem the material obscene they may simply invoke an administrative proceeding whereby they can stamp as unlawful mail matter between the parties and return to the sender and dishonor postal instruments. When administrative proceedings are commenced we find the prosecutorial parties, the quasi-judicial authorities and the parties seeking such relief all within the framework of the organization seeking to censor the mails. Upon instituting this procedure mail may be impounded by a collateral order from a United States District Court merely upon a showing of "probable cause." If the District Court denies the injunctive relief it in no way bars the departmental proceedings.

Effectively then this is a prior restraint for there has been no judicial determination removing the material from constitutional protection. In fact there need be none at all for if the parties wishing to utilize the mails do not seek judicial relief on their own no judicial scrutiny will be had.

Upon institution of administrative proceedings what is the period within which a final determination must be issued? The statute itself fails to set forth any requirements. When we review the administrative regulations we find they are "unduly cumbersome and time-consuming procedures", *Shuttlesworth v. Birmingham*, 394 U.S. 147, 162. A hearing must be provided,

"(W)henever practicable. . . within 30 days of the date of the notice"

of the hearing, 39 C.F.R., Section 952.7.

Following this hearing, the Postal Examiner is required to issue his findings with

"all due speed"

39 C.F.R., Section 952.4. If an adverse decision is given, the one seeking the use of the mails must himself seek an appeal to exhaust all administrative remedies. This appeal must be taken within 15 days of the Examiner's decision, 39 C.F.R., Section 952.25.

On appeal there is no limitation on when the decision must be given. Moreover, 39 C.F. R. Section 952.27 permits an Appellant under the postal laws to file a motion for reconsideration of the final departmental decision. In the interim all of the Appellee's incoming mail may be detained under an order, if obtained under Section 4007, merely upon

the showing of "probable cause." At this point the mail recipient must then apply to the courts for any relief that may be forthcoming, with the burden upon him to show that the administrative decision was erroneous. Needless to say the Court in *Freedman v. Maryland*, *supra*, did not envision such a protracted delay in the vindication of *First Amendment* rights.

Appellant makes a distinction between a board created for the express purpose of censoring versus the Post Office Department that was not created for such a purpose. Logic and facts in the case at bar will show that irrespective of the motivation creating an agency, the agency may embark upon the duties of a censor. This is amply shown in the case at bar. Were it not for the Postal authorities embarking upon the course of attempting to set up a mail block based upon the alleged obscenity of a named publication this matter would not now be before this Court. These same authorities had another route of procedure in instituting criminal sanctions under *18 U.S.C. 1461* which would have provided a prompt judicial determination of the violation in the atmosphere of an adversary hearing. These same authorities decided to forego such a hearing and proceed in the manner of a censor and attempt to set up a complete mail block. In this manner the Postal authorities may in and of themselves determine what is proscribable and inhibit if not prevent the recipient's use of the mails, irrespective whether the recipient has ever been convicted of a crime.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative

decision or in combination with a sweeping order under *Section 4007*, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"...the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

B. Orders issued under Authority of Section 4006 are constitutionally invalid.

The fraud sought to be condemned in *Section 4005* cannot be equated with regulation of ideological content sought under *Section 4006*. A *Section 4006* prohibitory order provides a complete mail block pending a showing to the contrary.

Under both the administrative procedure and the judicial procedure in aid of the *4006* enforcement, any denial of receipt of mail or delivery thereof, by necessity, also prohibits the receipt of mail items unconnected with the purportedly obscene materials involved in the controversy without the affirmative duty upon the intended recipient to seek the opening of and the examination of the materials and the showing to the postal authorities that the materials are clearly unconnected with the allegedly unlawful activity.

This Court has at various times had to rule upon actions taken under the postal regulations. A case of similar import to the one at bar was heard and decided and styled, *Lamont v. Postmaster General*, 381 U.S. 301, wherein the issue was one involving detention of mail that was deemed to be communist political propaganda. It was found that the detention once enacted required action upon the recipient's part in order to receive such detained mail. This requirement was found to be unconstitutional and repugnant to the safeguards of the *First Amendment*. Mr. Justice Douglas expressing the views of seven members of the Court stated variously:

"We conclude that the Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437, 65 L ed 704, 720, 41 S. Ct. 352 (dissenting): 'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'"

and Note 3 thereunder:

"3. 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.' *Pike v. Walker*, 73 App DC 289, 291, 121 F2d 37, 39. And see Gellhorn, *Individual Freedom and Governmental Restraints*, p. 8 et seq. (1956)."

The Court then continued stating the limitations upon Congress by virtue of the *First Amendment*:

"Here the Congress — expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 90 L ed 586, 66 S. Ct. 456, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage.

...

"The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."

Mr. Justice Brennan with Mr. Justice Goldberg in a separate concurring opinion enunciated:

"However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.' *Martin v. City of Struthers*, 319 U.S. 141, 143, 87 L ed 1313, 1316, 63 S. Ct. 862. Since the decisions today uphold this contention, I join the Court's opinion.

"It is true that the First Amendment contains no specific guarantee of access to publications. However,

the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497...

...

"I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

...

"But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, e.g., *Freedman v. Maryland*, 380 U.S. 51.

...

"...the statute under consideration, on the other hand, impedes delivery even to a willing addressee.

...

"If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights."

C. Section 4006 orders chill First Amendment freedoms

The Appellant argues that Congress is "entitled to chill" dissemination of *First Amendment* materials. They also argue that these procedures are relatively mild in comparison to criminal sanctions.

A reading of *Article I* of the *Constitution of the United States* reveals no such congressional powers. Whereas the *First Amendment* thereunder places a plain and concise prohibition against the exercise of such powers.

With regard to criminal sanctions, it may well be that their method is preferable. For in that type proceeding the mail blocks are not imposed and to properly convict of an offense the prosecution must bear the burden of proof before a judicial body beyond a reasonable doubt. Also the common law principle of strict construction and admissibility of evidence would apply. Yet this is not so in these administrative proceedings.

III.

Section 4007 and relief authorized thereunder is repugnant to and invalid under the *First Amendment* to the *Constitution of the United States*.

By like instance, in seeking an *ex parte* order under *Section 4007*, the postal authorities attempted to foreclose Appellee's unfettered receipt of all mail by a postal mail block. It would take a hardy individual to forward mail knowing that any and all replies would be held under a court order until each item was determined to clearly not be connected with the purportedly obscene mailings. Such an order may be issued *ex parte* since "probable cause" is all the Postmaster General must show and a postal block may be effected without first focusing on and determining the issue of obscenity *vel non* of the challenged material. Risk of delay in the final judicial determination of the allegedly obscene mailings is inherently built-in to the procedures provided for under *Sections 4006 and 4007*.

This Court, in numerous cases, has repeatedly condemned invalid "prior restraints" upon the free exercise of those fundamental freedoms guaranteed under the *First Amendment*. These cases clearly support the proposition that "prior restraints" of the type sought here by the Postmaster General are constitutionally invalid for lack of proper procedural safeguards in the sensitive area of freedom of expression.

As was stated in *Near v. Minnesota*, 283 U.S. 697, with regard to the imposition of a "prior restraint" on the freedom of expression:

"... the protection even as to previous restraint is not absolutely unlimited."

But in *Batam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that:

"any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity..."

In *Speiser v. Randall*, 357 U.S. 513 (1958), it was stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated... is finally drawn. The separation of legitimate from illegitimate speech calls for... sensitive tools..."

The "sensitive tools" referred to in *Speiser, supra*, have been determined by this Court to mean that in the protected area of freedom of expression the administrative officials and/or law enforcement officials may impose a prior restraint or temporary suppression only if they design and comply with procedural safeguards which obviate the dangers inherent in a

ensorship system. The procedural safeguards must be patterned in such a manner as to assure that the burden of promptly instituting adversary judicial proceedings and the burden of showing the expression is unprotected rest upon those seeking to restrain or suppress the expression and to also assure a prompt final judicial decision on the merits within the shortest fixed period compatible with sound judicial determination.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held the administrative procedural scheme of the Maryland Motion-picture censorship statute constituted an invalid "prior restraint" and violated the constitutional guarantee of freedom of expression because:

"First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the Section 2 requirement of prior submission of films to the Board an invalid previous restraint."

The reasoning underlying the necessity for a prior adversary judicial proceeding was held to be:

"The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial

determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, *supra*; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L ed 2d 809, 84 S. Ct. 1723; *Marcus v. Search Warrant*, *supra*; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 8 L ed 2d 639, 663, 664, 82 S. Ct. 1432."

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), this Court expressly condemned the seizure of allegedly obscene publications as an invalid "prior restraint" by stating:

"there is no doubt that an effective restraint indeed the most effective restraint possible was imposed prior to the hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the news stands and the premises of the wholesale distributor . . . the public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to out-wit the police by obtaining and selling other copies before they in turn could be seized . . . a distributor may have every reason to believe that a publication is constitutionally protected and will be so held after a judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes from him . . . mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

In a recent pronouncement by this Court involving *First Amendment* rights and "prior restraint," *Carroll v. President and Commissioners of Princess Anne, et al*, 21 L ed. 2d 325 (1968), Justice Fortas, expressing the views of eight (8) members of the Court, set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

"It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or

permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

...

"Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.

"Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceedings, cannot be sustained. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 6 L Ed 2d 1127, 1135, 81 S. Ct. 1708 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L Ed 2d 809, 84 S. Ct. 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for '*not first affording* (the seller of the books) *an adversary hearing*' (emphasis supplied) 378 U.S. at 211, 12 L Ed 2d at 813."

...

"...there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

...

"In the absence of evidence and argument offered by both sides and of their participation in the

formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication."

It was in the case styled, *Marcus v. Search Warrant*, *supra*, that this Court enunciated the principle that:

"...(U)nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech."

By analogy, it appears equally clear that the Federal Government may not impose similar procedures that violate the constitutional guarantee of freedom of expression and the constitutional right to use the mail by virtue of the Due Process Clause of the *Fifth Amendment of the Constitution of the United States*. See *Manual Enterprises, Inc., v. Day*, 370 U.S. 478, 518-519; *Lamont v. Postmaster General*, 381 U.S. 301.

Assuming, arguendo, that the Postmaster General was expressly authorized by Congress under *Sections 4006 and 4007* to impose such restraints and secure a temporary restraining order and a preliminary injunction in Federal District Court, still there would remain grave constitutional doubts as to the validity of such a procedure which does not provide for all the fundamental safeguards that this Court has consistently stated is required in the sensitive area of freedom of expression. The imposition of the restraints in the instant case by the Postmaster General, prior to a judicially superintended adversary proceeding, must be interpreted, in the light of this Court's rulings, to be invalid. These invalid "prior restraints" have had a "chilling effect" upon the Appellee's unfettered exercise of his freedom of expression as

well as his "open right" to use of the mails, thereby inducing self-censorship.

The Court in *Lamont v. Postmaster General*, 381 U.S. 301 quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the Coyne case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But when habit and law combine to exclude every other (means of transportation of mail) it seems to me that

the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . ."

The United States Court of Appeals for the Fifth Circuit in the matter entitled *Hiatt v. U.S.*, 415 F. 2d. 664, reversed the United States District Court for the Western District of Texas wherein the Appellant there was convicted of using the mails to solicit business in procuring foreign divorces. The Court there reviewed the history of power granted to the postal authorities in regulating the use of the mails. It then stated the restrictions upon the use of such power together with the rejection of the proposition that the use of the mails was a privilege and could be denied or restricted at the option of the postal authorities. The court stated:

"However, it is one thing to say, as the cases hold, that a power of Congress may legitimately be used to protect the public health, safety, welfare, or morals, and quite a different thing to say, as appellee apparently says, that its use of police power purposes automatically overrides the specific limitations on Congressional power that are contained in the Bill of Rights. Admittedly, the freedom of speech is not absolute; but neither may the powers of Congress,

even though delegated by the Constitution, be regarded as absolute, since they would obliterate the first amendment if asserted to their logical extreme. Thus both the commerce power and the tax power have been held to be circumscribed by the first amendment. See *Red Lion Broadcasting Co. v. FCC*, 1969, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371; *Murdock v. Pennsylvania*, 1943, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1291. Similarly, regulation of speech through the postal power, although it is authorized where necessary to effect legitimate legislative ends, is to be tested against the first amendment.

...

"We find that the trend of cases, and especially the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits. The need for Congress to respect the provisions of the Bill of Rights in the exercise of the postal power has long been emphasized.

...

"The now-famous Holmes dissent in *Milwaukee Social Democratic Pub. Co.* states that '(t)he United States may give up the post office when it sees fit, but while it carries it on the use of mails is almost as much a part of free speech as the right to use our tongues.' In another dissent, in the *Roth* case, Mr. Justice Harlan wrote: 'The hoary dogma of *Ex parte Jackson** * * and *Public Clearing House v. Coyne** * * that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated.' In *Roth*, if not in *Milwaukee*, the majority clearly agreed, because it discussed at length the question whether obscene materials sent through the mail constituted protected speech, an inquiry that would have been meaningless had the Court subscribed to the privilege doctrine."

Another infirmity in the statutory enactment of *Section 4007* is the vice of a "denial of equal protection of the laws." Under Sub-section (b), a provision that permits and specifies certain exempt publishers and their agents, the Appellee is separated from this arbitrary classification.

"(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers."

While it is true that the *Fourteenth Amendment* to the *Constitution of the United States*, which contains a specific provision against such laws enacted by the several states, does not apply to the federal government, the government is precluded from depriving a citizen of life, liberty or property, without due process of law under the *Fifth Amendment*. The writers of the federal Constitution saw fit to enumerate certain powers of Congress. However, many contained specific directions that the authority must be applied uniformly, i.e., "Duties, Imports and Excises," "Naturalization," "Bankruptcies", etc. When applying this principle together with reading the four corners of the Constitution it can readily be seen that when the *First Amendment* was written it was meant not only to prevent Congress from denying freedom of speech and press to all citizens but similarly Congress was precluded from denying the freedom to some of the citizens and exempting others from the prohibition. Under this exemption a publisher of materials holding a second class matter classification will not be subjected to a *4007* as Appellee has been.

Although much of the problem involving the denial of "equal protection" has arisen from state proceedings the principles are applicable here in the case at bar. This Court

stated the problem of such a denial in *McLaughlin v. Florida*, 379 U.S. 184:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

The United States Supreme Court in *Yick Wo v. Hopkins*, 30 L ed. 220 at page 225 delineated much of the protection afforded citizens wherein the Court stated at page 225, reaffirming its prior decisions:

"...in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

...

"...undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater

burdens should be laid upon one than are laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses . . . Class legislation, discriminating against some and favoring others, is prohibited."

CONCLUSION

In summary, Appellee has, on the basis of the applicable statutes and cases cited and represented to the Court in the premises, summarized the existing law on the issues before the Court. This, together with the actions of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control, in seeking to suppress from the public material presumptively protected under the *First Amendment* to the *Constitution of the United States* and conjunctively to establish a mail block restricting the right of Appellee to the use of the mails in receipt and delivery of mail and postal money orders, has effectively established an unlawful "prior restraint" creating a "chilling effect" upon and a denial of Appellee's freedoms guaranteed by virtue of the *First Amendment* to the federal *Constitution*, all of which may occur without a prior judicially superintended adversary hearing.

Sections 4006 and 4007 of Title 39 are repugnant to the provisions of the *First Amendment* in that they permit the Postmaster General and those acting under his authority and control to act as a censor by permitting an unlawful mail block and thereby denying Appellee those freedoms guaranteed by the *First Amendment* to the *Constitution of the United States*. And further, that there are no standards or guidelines to restrict the administrative officials in their action and therefore sweep within their purview presumptively protected *First Amendment* material of Appellee's. As cited

herein, *Section 4007* is further void as ancillary to *Section 4006* in that it creates an unconstitutional exemption denying Appellee the equal protection as well as application of the laws. This is all the more critical in the exercise of Appellee's *First Amendment* freedoms.

This case reveals a fundamental aspect of the collision between governmental police powers and the individual citizens freedom to choose, obtain and possess. *First Amendment* materials whether obscene *vel non* should not be proscribed in the absence of dissemination to juveniles and being foisted upon an unwilling individual or placed in front of the public by methods constituting "pandering." This freedom is empty without the correlative right to obtain these materials by lawful and legitimate means.

For the foregoing reasons, the judgments of the District Court should be affirmed.

Respectfully submitted,

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September, 1970.